

IN THE

Supreme Court of the United States

October Term, 1942

No. 707

BENJAMIN W. FREEMAN,

Petitioner,

v.

BEE MACHINE COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER

Of course, the merits or demerits of the alleged action under the Anti-Trust laws, which is involved in the jurisdictional matter with which the present petition for writ is concerned, has no relation to the question which it is desired to present, in case the petition is granted.

However, the respondent seeks on pages 14 to 16 of its brief to inject into this proceeding a series of statements on the subject of the merits of its proposed "amendment" to Bill of Complaint. We presume that this is in order to try to inject an *argumentum ad hominem* into the situation.

We ask leave to make a short reply on this subject.

1. Respondent uses "gross abuse" and such terms as to matters which do not exist. In the cause of *Bee Machine Co. v. Freeman* at Cincinnati, Freeman's residence (40 Fed. Supp. 299, affirmed by the Court of Appeals without opinion), similar charges were made by respondent. They were unsupported by fact.

2. The Cincinnati cause above noted shows that respondent is shedding crocodile tears about being required to sue Freeman at his residence where he can rightfully be served in a Federal action. That cause was brought by respondent at Cincinnati. It sought to enjoin Freeman from cancelling the license contract between himself and respondent for non-payment of royalties.

3. The conclusion of the Cincinnati cause was that the license contract of respondent was cancelled by a first notice in September, 1936. This was *months before the re-issues* as to which respondent now contends that it has a right of action based on Freeman's alleged acts of charging royalties on more than his patent claims cover. The contention is false. But whether true or not the respondent, not having any contract since grant of the reissues, can obviously not object any more than the general public. Hence the alleged "amendment" to Bill of Complaint setting up an action under the Anti-Trust laws is a sham.

4. We note that on pages 14 to 16 of respondent's brief it seems to be filing an argument in behalf of the petition for writ No. 696 filed by Altvater et al. against Freeman. The petitioner Altvater there and respondent here have by parallel actions against Freeman, given evidence long ago that *they are in collusion* to try to defeat the Freeman patents while holding on to rights under them, in case the patents could not be defeated. The Court will note that no other of the many Freeman licensees are objecting.

5. The statement that respondent is being caused to pay royalties into Court in the case of *Bee Machine Co. v.*

Freeman, under reissue patent 20,203, for *unpatented anvil dies*, is false. The preliminary injunction for which these royalty payments are a supersedeas was based on counterclaim under patent 20,202 and on claims covering *mask type dies* which were *held valid* by the Court of Appeals in *Freeman v. Premier*, 84 Fed. (2d) 425. An excuse to respondent for speaking de hors the present record might possibly arise, but to speak untruth with reference to such facts as appear of record in the District Court at Cincinnati, is indefensible.

6. It can thus be noted why it is that Freeman has sound reasons for not wanting to become involved in a jury trial on the alleged "amendment" to Bill of Complaint, since he will very apparently be faced with various charges irresponsibly made.

7. If this Court see fit to accept the present petition and grant the writ, we see no reason whatever why it should be concerned in one way or another with the propriety of the proposed "amendment" to Bill of Complaint.

8. The question is (not the soundness on the facts of the proposed pleading which we consider it had taste to try to inject into this matter in any event) but whether a District Court has jurisdiction to consider, in a removed case, an unrelated Federal cause of action, sought to be added to the original State action in the guise of an amendment to the original complaint, without service on the defendant other than that which was had in the State action.

9. That it is obvious that the service in this cause was of the type which should not be regarded as arising from a genuine desire to obtain redress of an injury, may be noted from the fact that the service of Freeman in the present cause was had before any Declaration had been filed in the Massachusetts State Court, that the declaration that was ultimately filed set up alleged breaches of the license contract from Freeman to respondent, which

contract had already been held cancelled for failure of respondent to pay royalties, and that if the effort of respondent is really what it says on page 16 of the brief, i. e., to have the Freeman reissue patents declared invalid, that there is pending at Cincinnati, Ohio, in the suit brought by respondent, a counterclaim by Freeman setting up the validity of his patents, and that they are infringed.

If this Court believes that the jurisdiction in the Federal Courts upon matters pleaded *de novo* after removal of state actions requires a clarification, it need have no qualms based on the nature of the particular pleading in this matter, against granting a writ.

Respectfully submitted,

MARSTON ALLEN,

NATHAN HEARD,

Counsel for Petitioner.